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COURT OF CRIMINAL APPEALS
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IN THE

COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

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COURT OF CRIMINAL APPEALS
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NO. PD-0264-17

ARMAUD SEARS, Appellant

v.

STATE OF TEXAS, Appellee

On Appeal from the 252nd District Court
Jefferson County, Texas
Trial Cause No. 13-17651
Before the Honorable Judge Larry Gist

RESPONDENT'S BRIEF ON THE MERITS

Lindsey Scott
State Bar No. 24054362
Attorney at Law
2809 Hwy 69 North
Nederland, Texas 77627
(409) 727-1036
(409) 727-1239 (fax)
lindsey@lindseyscottlaw.net

COUNSEL FOR RESPONDENT
ARMAUD SEARS

IDENTITY OF PARTIES AND COUNSEL

APPELLANT – ARMAUD SEARS

Trial Counsel:

David Grove
State Bar No.
Attorney at Law
2 Acadiana Court
Beaumont, Texas 77706
(409) 291-7201

Appellate Counsel:

Lindsey Scott
State Bar No. 24054362
Attorney at Law
2809 Hwy 69 North
Nederland, Texas 77627
(409) 727-1036
(409) 727-1239 (fax)
lindsey@lindseyscottlaw.net

APPELLEE: THE STATE OF TEXAS

Trial Counsel:

Assistant District Attorney
Brittanie Holmes
State Bar No.
Jefferson County Courthouse
1085 Pearl Street
Beaumont, Texas 77701
(409) 835-8550

Appellate Counsel:

Angela M. Kneeland
State Bar No. 24041263
Assistant District Attorney
Jefferson County Courthouse
1001 Pearl Street, 3rd Floor
Beaumont, Texas 77701
(409) 835-8550

Wayln G. Thompson
State Bar No. 19959725
Assistant District Attorney
Jefferson County Courthouse
1001 Pearl Street, 3rd Floor
Beaumont, Texas 77701
(409) 835-8550

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STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This was an appeal from a conviction for aggravated robbery, first degree felony, and a sentence of confinement for twenty-five years. (C.R. 89). The State charged Armaud Sears with aggravated robbery. (C.R. 6). Sears plead not guilty and the case was tried to a jury. (3RR, 45). The jury rendered a guilty verdict and assessed punishment. (C.R. 89). Mr. Sears timely perfected his appeal (C.R. 98, 106-107). On January 31, 2017, the Ninth Court of Appeals reversed Appellant's conviction for aggravated robbery, modified the judgment to render a conviction for robbery, reformed the judgment to delete the deadly weapon finding, affirmed the finding of guilt as modified, and reversed and remanded the cause as to punishment. *See Sears v. State*, No. 09-15-00161-CR, 2017 WL 444366, at *23 (Tex. App. – Beaumont Jan. 31, 2017, pet granted) (mem. op., not designated for publication).

The Court of Appeals found the evidence insufficient to support the aggravating element of the offense – that Appellant was aware that any firearm or other deadly weapon would be, was being, or had been used or exhibited during the offense. *Id.* at *9-10. The State filed a motion for rehearing, which the Court of Appeals denied on February 21, 2017. The State timely filed its petition for discretionary review on March 22, 2017. *See.* Tex. R. App. P. 68.2(a). This Court granted the State's petition on September 13, 2017, with the notation that oral argument would not be permitted. The State timely filed it's brief on the petition for discretionary review on October 5, 2017.

ISSUE PRESENTED

Issue: Is there sufficient evidence to show that Sears is criminally responsible as a party for the aggravating element of the offense – i.e. the use or exhibition of a deadly weapon? Specifically, does the record contain any evidence that Sears was aware that any firearm or other deadly weapon would be, was being, or had been used or exhibited during the offense?

Answer: No, the evidence is insufficient to show that Sears is criminally responsible as a party for the aggravating element of the offense. Specifically, the record contains NO evidence that Sears was made aware that any firearm or other deadly weapon would be, was being, or had been used or exhibited during the offense.

STATEMENT OF FACTS

Sears was indicted for aggravated robbery, for allegedly acting as the getaway driver in an aggravated robbery. (3RR, 56-61). The indictment alleged that on March 8, 2013, during the course of committing theft of Lakara Broussard that Sears used or exhibited a deadly weapon, a firearm. (C.R. 6). The state proceeded under the theory that Sears was a party to the offense by acting as the getaway driver. (4RR, 39-53).

During the trial, Lakara Broussard testified that at 4:45 am on March 8, 2013, three men dressed in all black and ski masks broke into her home. (3RR, 51-58). Kadrian Cormier, Broussard's boyfriend at the time, was there along with her two kids. (3RR, 52-57). Broussard testified that Cormier left the home during the robbery leaving her and her two kids alone in the home with the gunmen and returned when the robbery was over. (3RR, 75, 81-82). Broussard testified that $3,000 dollars and a ring and watch were stolen from under her bed and that Cormier and another girlfriend were the only people who knew that she had the cash. (3RR, 61, 77). She also testified that the suspects appeared to know she had cash in the home and where it was located. (3RR, 128). Evidence was presented that Broussard actually told officers that $5400, from her tax return, had been stolen from her as well as the watch and ring and that she and Cormier had filled out an insurance policy together to cover the items. (3RR, 92, 107).

Detective Aaron Lewallen testified at trial regarding Cormier's version of events. (4RR, 38-39). The defense objected to the statements made by Cormier being admitted, but the court overruled the objection. (4RR, 39). Detective Lewallen testified that Cormier told him that when the home invasion started he climbed out the window to get help. (4RR, 39). Lewallen further testified that Cormier told him once outside he flagged down a red Toyota Tundra and got inside, but then felt that maybe the driver was involved in the aggravated robbery so he escaped from the tundra and got the license plate number. (4RR, 39-41). Lewallen testified that Broussard originally told him $3,000 was taken and that only Broussard and Cormier knew about the money. In addition, State's exhibit 46, a 911 call made by Cormier, was admitted into evidence and played for the jury. (4RR, 8-9). During that call Cormier described a red Toyota Tundra and a silver 4-Runner as being used in the commission of the robbery. (4RR, 8-9). However, Lewallen testified that there was no follow up investigation done on the silver 4-Runner. (4RR, 71).

Officer Cesar Augustus Beattie Jr. testified that Cormier was "bouncing back and forth on his statement." (3RR, 111). First telling officer Beattie that there were two subjects inside the house, then saying he didn't see anything, then later stating never mind, he did see two subjects in the house. (3RR, 111). Beattie testified that Cormier told him "once [Cormier] was outside the house he jumped over one of the fences to get away from the residence and as he was walking down the road he flagged down a red Toyota Tundra." (3RR, 98). Beattie further testified that Cormier told

him he had flagged down Sears alleged vehicle after walking down the road and once he jumped out of that vehicle he flagged down another vehicle and that person drove him back home. (3RR, 99-101). Beattie also testified that Cormier should possibly have had worse injuries from allegedly jumping out of Sears's moving vehicle. (3RR, 120). Moreover, Beattie testified that Broussard told him it was four (not three) suspects that had broken into the residence. (3RR, 104). Broussard even gave Beattie a description of all four suspects, describing suspect four as a black male, short and medium size. (3RR, 116).

Officer Little testified that Cormier was already there on scene when he arrived and Cormier did not seem upset and said he did not know what had happened. (3RR, 135). Little testified that he believed the robbery was an "inside job" done with Cormier's help because Broussard told him only her and Cormier knew where the money was, and Little did not believe that Cormier could have gone through the bathroom window. (3RR, 136). Broussard also gave conflicting statements to police telling Little that she helped Cormier back into the house through the bathroom window (3RR, 143), but testifying that she and her children remained locked in the bedroom until Cormier came back and knocked on the bedroom door. (3RR, 82). In speaking with officer Little, Broussard could not recall why there was a time lapse in between the suspects leaving the home and her calling the police. (3RR, 137).

The State called witness Crystal Foxall to testify that she rented the red Toyota Tundra for Sears. (4RR, 19). Foxall testified that she let Sears use the truck for a few

weeks but had no idea who was really driving it. (4RR, 23-24). She also admitted that she had seen someone else driving the truck who was not Sears, however she did not know his name. (4RR, 24). Then the State called witness Joshua Bendy to testify and Bendy testified that he did not remember giving a statement and he did not know anything about Sears or the robbery. (4RR, 31-33).

The State called Chris Portner who testified that he saw a red Toyota Tundra in the area near the time of the offense with the same license plate number that Cormier had reported to police. (4RR, 12-16). Portner testified that he saw three men wearing hoods over their heads come out of a ditch that runs alongside the neighborhood near Westgate and Dowlen road. (4RR, 12). Portner testified that he watched the men get into the vehicle, however, he did not see any guns and could not identify the driver of the vehicle. (4RR, 15-16). When asked "if one of them had been carrying a long gun like a shotgun or rifle, you probably would have seen that because…that's pretty bulky, isn't it?" (4RR, 15). Portner responded, "yeah, that's a bulky item, probably. I would think so." (4RR, 15-16). There was no evidence or testimony from Portner regarding what type of clothing the three men were wearing other than that they had hoods over their head. (4RR, 11-17). The three men that entered the red Toyota Tundra that day were never identified, and there was no evidence that the ditch the three men came out of or any of the area surrounding Broussard's home or neighborhood was ever searched for the firearms. None of the alleged firearms were ever located.

The jury was given a jury instruction on "parties" to an offense. (C.R. 58). However, there was no testimony presented that Sears, if he was a party to the offense, had any knowledge of the use or potential use of a weapon or firearm during the commission of the offense. No evidence was presented that was sufficient to prove Sears was guilty as a party to the offense of the aggravating element of the offense. Furthermore, the only evidence that Sears was involved as a party to the offense at all was that he was present near the scene that day in the red Toyota Tundra. However, mere presence at the scene, alone, is not enough for party liability.

The jury returned a verdict finding Sears guilty as charged in the indictment. (4RR, 113). Sears elected to have the jury assess punishment. (C.R., 46). During punishment, the defendant pled true to the enhancement paragraphs of the indictment. (4RR, 115-116). The jury assessed Sears punishment at twenty-five years in the Institutional Division. (4RR, 128-129). That sentence has since been reversed by the Ninth Court of Appeals. Sears v. State, 2017 WL 444366, * 10 (Tex. App. Beaumont, 2017, pet. granted).

SUMMARY OF THE ARGUMENT

There was insufficient evidence to support Sears's conviction for the charged offense of aggravated robbery. There is insufficient evidence that Sears was responsible for the aggravating element of the offense because there is no evidence that Sears was made aware that any firearm or other deadly weapon would be, was being, or had been used or exhibited during the offense.

There was no direct or circumstantial evidence presented at trial that would support a reasonable inference that Sears was criminally responsible for the aggravating element of the offense, and to conclude otherwise calls for mere speculation. Juries are not permitted to come to conclusions based on mere speculation or factually unsupported inferences or presumptions. Even if the jury believed that Sears participated in the robbery as a getaway driver, there is no evidence in the record that he dropped off the men before the robbery, or evidence as to how the masked men got to Brown's house. However, there was evidence that a newer model silver Toyota 4-Runner was involved in the robbery. Based on the evidence it is very possible that this vehicle brought the intruders to Brown's home. In the 911 call, Cormier spoke to the 911 operator and stated that the intruders left in a red Toyota Tundra "and a newer model silver Toyota 4-Runner." In addition, there is conflicting evidence about whether or not it was three or four men that entered the home to commit the robbery. Thus, it is possible that a fourth intruder escaped with any firearms in the silver 4-Runner.

Furthermore, there is no evidence that the red Toyota Tundra was parked outside Brown's home during the robbery or otherwise present prior to the robbery. The evidence presented showed that Cormier had to walk down the street and "flag down" the Toyota Tundra. In addition, there is no evidence that Sears ever entered Brown's home, could see what was happening inside Brown's home, or that Cormier ever told Sears that the intruders had exhibited firearms during the robbery. Moreover, and significantly, the eye witness that saw three men come out of a ditch and enter the red Toyota Tundra after the robbery testified that he did not see any firearms. Thus, the direct evidence establishes the three men were not carrying visible firearms when they entered the Toyota Tundra. Based on the evidence, and even accepting testimony that firearms were used during the commission of the offense, it is reasonable to infer that the firearms were discarded somewhere between Brown's home, the neighborhood, and the ditch the three men were seen coming out of on Dowlen and Westgate. In fact, it is unlikely that intruders would be roaming around Dowlen and Westgate carrying a long gun. There is simply no evidence on which to base a reasonable inference that Sears knew that a firearm would be, was being, or had been used or exhibited during the commission of the offense. The only evidence presented at all regarding the use or exhibition of a firearm was from Brown who testified that the intruders carried guns inside the home. The record is devoid of any evidence that Sears knew or was ever made aware that a firearm was used or exhibited during the commission of the offense.

While juries are permitted to draw multiple reasonable inferences as long as each reasonable inference is supported by the evidence presented at trial, juries are not permitted to come to conclusions based on mere speculation or factually unsupported inferences or presumptions. Without at least circumstantial evidence to support the conclusion that Sears was aware of the use of a firearm during the commission of the offense, there is insufficient evidence that Sears is responsible for the aggravating element of the offense. Thus, the opinion of the Ninth Court of Appeals is well reasoned and should be upheld.

ARGUMENT

I. The evidence is insufficient to support Sear's conviction for the charged offense of aggravated robbery.

The indictment charged that on March 8, 2013, Sears "did then and there while in the course of committing theft of property owned by Lakarra Broussard, hereafter styled the Complainant, and with intent to maintain control said property, intentionally and knowingly threaten and place the complainant in fear of imminent bodily injury and death, by using and exhibiting a deadly weapon, to wit: a firearm…" (C.R. 6).

A. Standard of Review

An appellate court reviews a challenge to the sufficiency of the evidence under the standard set forth in *Jackson v. Virginia*, 433 U.S. 307, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979); *Brooks v. State*, 323 S.W.3 893, 912 (Tex. Crim. App. 2010) (there is no longer any meaningful distinction between a legal and factual sufficiency standard when reviewing sufficiency of evidence to support a criminal conviction); *Polk v. State*, 337 S.W.3d 286, 288-89 (Tex. App. – Eastland 2010, pet ref'd). Under the *Jackson* standard, the Court examines all the evidence in the light most favorable to the verdict and determines whether, based on that evidence, any reasonable inferences from the evidence, any rational trier of fact could have found the essential elements of the

offense beyond a reasonable doubt." *Jackson*, 443 U.S. at 319; *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010).

Under this standard, the Court will defer to the trier of facts resolution of conflicts in testimony, responsibility to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Jackson*, 443 U.S. at 319; *Brooks,* 323 S.W.3d at 894, 899, 916. Considering all of the evidence in the light most favorable to the verdict, the court will determine, whether the jury was rationally justified in finding guilt beyond a reasonable doubt for the charged offense. *Jackson,* 443 U.S. at 319; *Brooks*, 323 S.W.3d at 899.

Moreover, circumstantial evidence is as probative as direct evidence in establishing guilt, and circumstantial evidence alone can be sufficient to establish guilt. *Winfrey v. State*, 393 S.W.3d 763, 771 (Tex. Crim. App. 2013) (*citing Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007)). However, while juries are permitted to draw multiple reasonable inferences as long as each reasonable inference is supported by the evidence presented at trial, **"juries are not permitted to come to conclusions based on mere speculation or factually unsupported inferences or presumptions."** *Id.*; *Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013) (citing *Jackson*, 443 U.S. at 318-19).

"[A]n inference is a conclusion reached by considering other facts and deducing a logical consequence from them," while "[s]peculation is mere theorizing or guessing about the possible meaning of facts and evidence presented." *Id.* "A conclusion

reached by speculation…is not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt." *Id.* "If the evidence at trial raises only a suspicion of guilt, even a strong one, then that evidence is insufficient [to convict]." *Urbano v. State*, 837, S.W.2d 114, 116 (Tex. Crim. App. 1992), *superseded in part on other grounds, Herrin v. State*, 125 S.W.3d 436, 443 (Tex. Crim. App. 2002)).

The State points to the U.S. Supreme Court's decision in *Coleman v. Johnson*, to make the argument that it is the responsibility of the jury – not the court – to decide what conclusions should be drawn from the evidence admitted at trial. *Coleman v. Johnson*, 566 U.S. 650, 132 S. Ct. 2060, 2064 (2012). In *Coleman*, the U.S. Supreme Court concluded that the evidence was sufficient to convict Johnson as a co-conspirator and accomplice to murder. *Coleman*, 132 S. Ct. at 2065. However, in *Coleman* there was vast evidence showing that Johnson knew the principal offender was armed with a shotgun and intended to kill the victim. *Id.*

The Court based its finding on evidence that Johnson and the principal offender "ran the streets together," had attempted to collect a debt from the victim together earlier on the day of the murder, Johnson knew the principal offender was armed with a shotgun based upon evidence that (1) the principal offender was noticeably concealing a bulky object under his trench coat, (2) the principal offender had repeatedly stated throughout the day in Johnson's presence that he intended to kill the victim, and (3) Johnson helped usher the victim into the alleyway to meet his fate, where (4) Johnson stood at the entryway while the principal offender pulled out a

shotgun and shot the victim in the chest. *Id.* at 2065. Thus, the Court held that on the basis of *these facts*, a rational jury could infer that Johnson knew that the principal offender was armed with a shotgun and intended to kill the victim. *Id.*

Clearly, *Coleman* is distinguishable from the case here. Here, there was no evidence presented that Sears observed any of the parties who allegedly entered his truck that night concealing any type of weapons. Likewise, there was no evidence that the eye witness who observed the men entering Sears's truck observed them concealing any type of weapons or concealing anything at all. To the contrary, the eye witness testified at trial that he saw three black men come out of a ditch and get into the vehicle allegedly driven by Sears, however, he did not see any guns. (4RR, 15-16).

Also unlike the evidence in *Coleman,* here there was no evidence that Sears participated in the robbery in any way other than as the alleged get-away driver, and no evidence that he ever entered the home or could see into the home at all. Unlike here, in *Coleman*, there was evidence the jury could have relied on to convict Johnson as a co-conspirator and accomplice. Here there is no evidence the jury could have used to infer that Sears knew the principal offenders were armed with guns. Finally, even accepting the theory that Sears was the "getaway driver," there is no evidence that Sears had any reason to believe the three men who entered the home had any plans to harm Broussard such as would require the use of a firearm. In fact, to the contrary, there is evidence that this was an "inside job" set up by Broussard's boyfriend, thus giving rise to an inference there were never any intention to harm

Broussard or her children, but rather an intention to take money and leave without harming anyone. Cormier's presence in the home when the three men entered coupled with the fact that Broussard was Cormier's boyfriend further undermine any arguable inference that Sears should have known the intruders were carrying firearms. *Coleman* is inapposite to the present case.

B. The evidence presented is insufficient to show that Sears acted as a party to the offense of aggravated robbery.

In *Hooper*, this Court held that while juries are allowed to draw reasonable inferences to reach a verdict, each inference must be supported by the evidence presented at trial. *Hooper v. State*, 214 S.W.3d 9, 15 (Tex. Crim. App. 2007). Juries are not permitted to come to conclusions based on mere speculation or factually unsupported inferences or presumptions. *Winfrey*, 393 S.W.3d at 771. A review of the evidence presented at trial establishes the evidence is insufficient to show that Sears acted as a party to the offense of aggravated robbery.

1. Applicable law.

"A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both." Tex. Penal Code Ann. § 7.01(a) (West 2011). "A person is criminally responsible for an offense committed by the conduct of another if…, acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense[.]"

Id. § 7.02(a)(2). Under the law of parties, standing alone, proof that the accused was present at the scene of the crime or assisted the primary actor in making his getaway is insufficient evidence to convict. *Wooden v. State*, 101 S.W.3d 542, 546 (Tex. App. – Fort Worth 2003); *Scott v. State,* 946 S.W.2d 166, 168 (Tex. App. – Austin 1997, pet ref'd). A person commits, aggravated robbery if he commits robbery and "uses or exhibits a deadly weapon." Tex. Penal Code Ann. § 29.02(a)(2). A firearm, which was alleged to have been used in the indictment, is a deadly weapon *per se. Id.;* § 1.07(a)(17)(A).

The evidence is insufficient to show that Sears acted as a party to the offense of aggravated robbery because there is no evidence that defendant was criminally responsible for the aggravating element. "A conviction for an aggravated robbery offense must be supported by evidence that the defendant, committed, or was criminally responsible for committing, the aggravating element." *Stephens v. State*, 717 S.W.2d 338, 340 (Tex. Crim. App. 1986, pet ref'd.). In an aggravated robbery case in which the aggravating element is the use or exhibition of a deadly weapon, the defendant may be held criminally responsible for the aggravating element under a theory of party liability if the State proves beyond a reasonable doubt that the defendant knew a deadly weapon would be used in the course of committing the robbery. *Sears. v. State*, 2017 WL 444366, *9 (Tex. App. – Beaumont 2017,pet. granted); *Jackson v. State*, 487 S.W.3d 648, 656 (Tex. App. – Texarkana 2016, no pet);

Adkins v. State, 274 S.W.3d 870, 875 (Tex. App. – Fort Worth 2008, no pet); *Rodriguez v. State*, 129 S.W.3d 551, 563 (Tex. App. – Houston [1st Dist.] 2003, pet ref'd).

Specifically, there must be direct or circumstantial evidence that the defendant not only participated in the robbery before, while, or after a deadly weapon was displayed, but "did so while being aware that the [deadly weapon] would be, was being, or had been, used or exhibited during the offense." *Id*; (citing *Wyatt v. State*, 367 S.W.3d 337, 341 (Tex. App. – Houston [14th Dist] 2012, pet. dism'd). "Otherwise, 'the evidence necessary to convict [the defendant] as a party to aggravated robbery would be no different than that to convict him as a party to (ordinary) robbery, i.e. mere participation in the robbery.'" *Sears v. State*, 2017 WL 444366 at * 9 (Tex. App. – Beaumont, 2017, pet granted); *See also Wyatt v. State*, 367 S.W.3d 337, 338-339 (Tex. App. – Houston [14th Dist.] 2012, no pet) (quoting *Kanneh* v. State, No. 14-00-00031-CR, 2001 WL 931629, at *2 (Tex. App. – Houston [14th Dist.] Aug. 16, 2001, pet. ref'd) (not designated for publication)).

2. There was no direct or circumstantial evidence presented at trial that would support a reasonable inference that Sears was criminally responsible for the aggravating element of the offense, and to conclude otherwise calls for mere speculation.

Juries are permitted to draw multiple reasonable inferences as long as each reasonable inference is supported by the evidence presented at trial, however, **"juries are not permitted to come to conclusions based on mere speculation or factually unsupported inferences or presumptions."** *Winfrey v. State*, 393 S.W.3d

763, 771 (Tex. Crim. App. 2013) (quoting *Hooper*, 214 S.W.3d at 16). Furthermore, "[A]n inference is a conclusion reached by considering other facts and deducing a logical consequence from them," while "[s]peculation is mere theorizing or guessing about the possible meaning of facts and evidence presented." *Id.* "A conclusion reached by speculation…is not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt." *Id.*

First, the evidence does not support a reasonable inference that Sears transported the intruders to Brown's home directly before the robbery, as argued by the State. To support this argument, the State alleges that Cormier found Sears in the red Toyota Tundra "by Brown's driveway in front of the house." (Pet. Br. p. 17). Therefore, the jury could have reasonably inferred that Sears had driven the intruders to Brown's house to commit the robbery. However, the record indicates that officer Beattie testified that Cormier stated he "flagged down" the red Toyota Tundra after leaving Broussard's home and "walking down the road." (3RR, 98). Officer Little testified that he did not take a statement from Cormier. (3RR, 127). Detective Lewallen testified that Cormier stated that, "as he was running from the house" he saw a red Toyota Tundra "driving down the road near Ms. Broussard's driveway," and "[h]e flagged it down." (4RR, 39).

Notably, Officer Beattie spoke with Cormier first, at the scene, just a short time after the robbery had occurred. (3RR, 98). Detective Lewallen testified that after a police officer does an offense report the case gets assigned to a division and then

disseminated to one of the different detectives. (4RR, 36). Further, Detective Lewallen testified that once a case is assigned to him, he then makes contact with the different victims and witnesses. (4RR, 36). There is no evidence in the record as to how long Detective Lewallen waited after being assigned the case to make contact with Cormier and ask him what had happened. (4RR, 36).

Cormier's statements regarding whether the red Toyota Tundra was "down the road," or "near the driveway" are conflicting. The original statement taken from Cormier the night of the robbery just shortly after the robbery had occurred was that he had "walked down the road" after leaving Broussard's home and "flagged down" the red Toyota Tundra. (3RR, 98). Cormier never said on the night of the robbery that the red Toyota Tundra was near the driveway, therefore, the strongest more reliable testimony indicates that the red Toyota Tundra was not in front of Brown's house. Likewise, the statement Cormier gave Detective Lewallen indicated "he was running from the house" when he saw the red Toyota Tundra. (4RR, 39). Thus, it is reasonable to infer that the Toyota Tundra was not in front of Brown's home. In addition, the statement by Cormier that the vehicle had to be "flagged down" suggest that the driver of the red Toyota Tundra was driving and not parked anywhere.

The State argues that "while a reasonable alternative hypothesis might be that the 4-Runner had dropped off the intruders instead of [Sears] in the Toyota Tundra," "there is no evidence in the record that the 4-Runner had dropped off the intruders." (Pet. Br. p. 30). Likewise, there is no evidence in the record that Sears dropped off

the intruders in the Toyota Tundra. Moreover, there is no direct or circumstantial evidence in the record on which the jury could have based a reasonable inference that the Sears dropped off the intruders, and to suggest as much is mere speculation and is factually unsupported.

Second, even if Sears had dropped off the intruders, the evidence does not support a reasonable inference that at least one of the intruders exhibited his weapon to Sears before the robbery and that Sears would have known it was his intent to use the weapon, as argued by the State. To support this argument, the State points to the fact that there was no evidence that any of the intruders wore any type of clothing (such as a large overcoat) that might be capable of concealing a long gun, thus, the alleged "long gun" would have had to be visible to Sears when the intruder entered his truck. Sears agrees that there is no evidence that any of the intruders wore any type of clothing capable of concealing a long gun, which is why if any of the men coming out of the ditch that night had been carrying this type of gun when entering the red Toyota Tundra the eye witness who watched them entered the truck would have seen it. Yet, he did not. The fact that none of the men were wearing clothing capable of concealing the alleged "long gun," coupled with the eye-witness's testimony that he did not see a gun fatally undercuts the State's position. This is especially true given that the three men did not get into the truck directly after existing the home. Rather they were seen coming out of a ditch. Had they been carrying firearms they could have been stashed anywhere.

There is no evidence upon which to base a reasonable inference that Sears would have seen a firearm. The only eye witness states that he saw no firearms and if there had been a long gun it would have been difficult to conceal. (4RR, 15-16). The State introduced no evidence that Sears was aware that any of the intruders had any type of firearms. Additionally, the State points to no evidence that supports its assertion that Sears dropped the intruders off at Broussard's home to commit the robbery.

However, there was evidence presented at trial that Broussard told officer Beattie that four intruders (not three) entered the home. (3RR, 104). Broussard even gave a description of the fourth intruder. (3RR, 116). Therefore, it is reasonable to infer that the fourth intruder left separately with any firearms. There was also evidence that a newer model silver 4-Runner was involved in the robbery (3RR, 8-9). During the 911 call that was played for the jury, Cormier described a silver 4-Runner as having been used during the commission of the robbery (4RR, 8-10). Thus, it is reasonable to infer that the fourth intruder left with any firearms in the sliver 4-Runner, or that the three intruders seen entering the red Toyota Tundra with no firearms had stashed their firearms in either the silver 4-Runner, the ditch they had just come out of near Dowlen road and Westgate, or anywhere else in the neighborhood between Broussard's home and the location where they were seen entering the red Toyota Tundra.

Officer Little testified that the information that went out over dispatch was that "three males were seen running to [the truck] from a culvert that runs behind Daisy

and Ivy in that cul-de-sac area towards Dowlen." (3RR, 126). Thus, there are many locations within that area that the three men could have stashed or discarded any firearms they were carrying. These theories are supported by the evidence presented, that the eye witness who called 911 to report three suspicious men coming out of a ditch and entering the red Toyota Tundra did not see them carrying any guns. Therefore, Sears would also not have seen any guns. Any other conclusions would be based on mere speculation or factually unsupported inferences or presumptions.

In addition, the State argues that the jury could infer the robbery was planned. Even if the jury could infer that the robbery was planned, there is no evidence that would lead to a reasonable inference that Sears knew that a deadly weapon would be, was being, or had been, used or exhibited during the offense. To conclude otherwise, is just mere speculation.

3. There was no evidence that the jury could have used to infer that Sears was aware of the aggravating element of the offense, and W*yatt*, *Kanneh, Scott, and Stephens* are instructive.

As stated in Sears's brief before the Ninth Court of Appeals, *Wyatt*, *Kanneh, and Stephens* are instructive in this case. the Ninth Court of Appeals was correct in relying upon *Wyatt* to support its conclusion that the State has not pointed to any evidence in the record that Sears knew that a firearm or other deadly weapon would be used during the commission of the robbery, and there was none found in their review of the evidence presented at trial. *Sears*, 2017 WL 444366 *10. Additionally, the Court

was correct in holding that without at least circumstantial evidence to support it, such a conclusion cannot properly be based on speculation or assumption. *Id.*

In *Wyatt*, appellant was the getaway driver in a bank robbery in which the suspect who robbed the bank went inside and brandished a gun and stole money from the bank teller. *Wyatt v. State*, 367 S.W.3d 337, 338-339 (Tex. App. – Houston [14th Dist.] 2012, no pet). The evidence showed that appellant participated in the robbery as the getaway driver and by sharing in the proceeds from the robbery. *Id.* at 341. However, the record contained no evidence that appellant ever was aware that a firearm "would be, was being, or had been used or exhibited during the offense." *Id.* The court reversed the jury's verdict and held the evidence was insufficient to support appellant's conviction based on a theory of party liability, in part, because the record contained no evidence showing appellant knew or should have known a firearm would be used. *Id.* 340-43.

The court reasoned that the State presented no evidence that the suspect who brandished the gun inside the bank ever exhibited or otherwise made appellant aware of the firearm at any time before he brandished the weapon inside the bank. In addition, the court noted that "although it would seem intuitively likely" that appellant knew of or saw the other party's gun before or after the robbery, "without at least circumstantial evidence to support it, such a conclusion cannot properly be based on speculation or assumption." *Id.* at 343 (quoting *Kanneh v. State,* No. 14-00-00031*,* WL 931629, at *3. (Tex. App. – Houston [14th Dist] 2001). The court in *Wyatt* noted:

> Numerous courts have concluded that the lack of such evidence prevents the state from proving that the appellant was criminally responsible for the aggravating element, and therefore will not support a conviction for aggravated robbery based on a theory of party liability. *See e.g., Rodriguez v. State*, 129 S.W.3d 551, 563-64 (Tex. App. – Houston [1st Dist.] 2003, pet ref'd) (op on reh'g) (reversing judgment of conviction for aggravated robbery based on theory of party liability and rendering judgment of acquittal because record contained no evidence that appellant saw, could have seen, or otherwise knew about deadly weapon used by primary actor during robbery while appellant waited in getaway van outside); *Wooden v. State*, 101 S.W.3d 542, 547-48 (Tex. App. – Fort Worth 2003, pet. ref'd) (reversing judgment of conviction for aggravated robbery based on theory of party liability and rendering judgment of acquittal because record contained no evidence that appellant knew passenger behind appellant had a firearm or that appellant aided or encouraged passenger to threaten victim next to the vehicle with firearm); *see also Gray v. State*, No. 02-08-164-CR, 2009 WL 1905322, at *4-5 (Tex. App. – Fort Worth July 2, 2009, pet ref'd) (mem. op., not designated for publication) (sustaining appellant's issue challenging felony murder based on theory of party liability for underlying aggravated robbery charge, despite fact that appellant showed his father's guns to primary actor before agreeing to rob two individuals by beating them, because appellant did not see primary actor with appellant's father's gun until after the primary actor shot the individuals while appellant was downstairs; sustaining felony murder conviction based on lesser included offense of robbery as underlying felony); *Kanneh*, 2001 WL 931629, at *2-3 (sustaining appellant's issue challenging conviction for aggravated robbery based on theory of party liability because "there is no direct or circumstantial evidence suggesting that appellant was ever aware of the knife and the evidence is at best, ambiguous whether it was ever even visible to him" during joing-commission of robbery; reforming judgment to reflect lesser-included offense of robbery because appellant requested instruction on such lesser-included offense). *Wyatt*, 367 U.S. at 341-42.

Likewise, here, there is no evidence that Sears, was aware that a deadly weapon "would be, was being, or had been used or exhibited during the offense." The evidence presented in the form of hearsay testimony under the doctrine of forfeiture by wrongdoing of Cormier's statements that Sears was driving a red Toyota Tundra that *Cormier* believed was involved in the aggravated robbery makes no suggestion

whatsoever that Sears would have seen or known about any weapon allegedly used during the commission of the offense. The only evidence presented that a weapon was used in this offense was the testimony of Broussard who said that the suspects who robbed her had a gun. (3RR, 56). The record is devoid of any evidence regarding the identity of the other suspects who actually committed the aggravated robbery.

Furthermore, eye witness, Chris Portner, testified for the State that he called 911 and reported the red Toyota Tundra and the license plate number after he saw three men run out of a ditch and get into the vehicle, which he found suspicious. (4RR, 12-13). However, there was no testimony that Portner saw any of the three men carrying a gun. On the contrary, Portner testified on cross examination that if one of those three men had been carrying a long gun (the type described by witness Broussard as being used during the commission of the offense) that he would have seen it, and he did not. (4RR, 15-16). On the record before this Court, no reasonable inference can be drawn that Sears was aware that a deadly weapon would be, was being, or had been used during the commission of the offense.

The State argues that *Wyatt* is distinguishable because in *Wyatt* the gun that was used was capable of concealment, whereas here, the gun was described as a long gun that would be difficult to conceal. However, this very argument supports Sears's position that because a long gun would have been difficult to conceal the eye witness would have seen it if one of the men had been carrying it upon entering the red

Toyota Tundra. However, based on the evidence presented, no one saw any guns of any type besides Broussard.

While the evidence is insufficient to support the State's theory, the evidence presented does support a reasonable inference that a fourth intruder could have disposed of any guns, a silver 4-Runner was likely involved in the robbery and could have been where the guns were stashed, and the guns could have been hidden or discarded anywhere between Broussard's home and the ditch the three men came out of. Based on the evidence, there was no attempt made to search for or locate the guns and the guns were never located. There is no evidence that would lead to a reasonable inference that Sears knew that a deadly weapon would be, was being, or had been, used or exhibited during the offense. To conclude otherwise, is just mere speculation. Thus, *Wyatt* is instructive.

In support of its conclusion in *Wyatt* that "although it would seem intuitively likely" that appellant knew of or saw the other party's gun before or after the robbery, "without at least circumstantial evidence to support it, such a conclusion cannot properly be based on speculation or assumption," the *Wyatt* Court cited *Kanneh* v. State, 14-00-00031-CR 2001 WL 931629 at *3. The State argues that *Kanneh* is distinguishable because the knife in *Kanneh* was likely small and would have been easy to conceal, whereas here, the long gun would have been difficult to conceal and the manner in which the weapon was handled would have made it visible to someone in the area.

However, that is the exact reason it is unreasonable to infer that Sears saw a firearm when the eye witness, Chris Portner, who saw the three alleged intruders entered the red Toyota Tundra testified that he saw no guns. (4RR, 15-16). Further, Portner testified that had one of the men been carrying a long rifle like gun he feels he would have seen it because it would have been difficult to conceal. (4RR, 15-16). Additionally, no guns were ever located in the red Toyota tundra or anywhere else. Similar to *Kennah*, where "it would intuitively seem likely that appellant would have known of or seen his companion's knife, before, during, or after such an encounter, without at least circumstantial evidence to support it, such conclusion cannot properly be based on speculation or assumption." *Id.* at *2. Here, there is no evidence, circumstantial or otherwise, to support the proposition that Sears would have seen or known about the use of a gun during the commission of the robbery. Thus, *Kanneh* is instructive.

The State also argues that this case is distinguishable from *Scott v. State*, because in *Scott,* the getaway driver had no knowledge of a weapon being used for a robbery when his passengers asked him to pull over behind some apartments while they ran into a store, and although he thought he saw a revolver in one of the passenger's pockets, he did not have a view inside the store. *Scott v. State*, 946 S.W.2d 166, 168 (Tex. App. – Austin 1997, pet. ref'd). The evidence showed that the passengers returned to the vehicle and told the defendant to go, and once he was driving away they stated they had robbed the store and there had been a shooting. *Id.* at 168-69.

On the contrary, here, there is no evidence that Sears dropped the intruders off at Brown's home, or that he knew ahead of time what they had planned to do. Furthermore, there is no evidence that Sears knew or ever became aware that a gun had been used in the course of the robbery or that the three men provided him with any details regarding the robbery. In addition, there is no evidence that Sears could see inside Broussard's home. There is only evidence that Sears may have been driving the vehicle that picked up the alleged intruders (who were never identified) after the robbery. Thus, it is not reasonable to infer that Sears knew the intruders planned to rob Broussard or that Sears had any knowledge that guns would be used or were used during the commission of the robbery. Thus, *Scott* is instructive.

Finally, Sears disagrees with the State's attempt to couch *Stephens* as distinguishable. *Stephens* is instructive and applicable to the present case. In *Stephens*, a woman was abducted and taken to an apartment bedroom, threatened with physical harm, and raped. *Id.* at 338. Although there was evidence that appellant rented the apartment, was present at the apartment when the rape occurred and later had sex with the complainant, there was no evidence that the appellant was in the room when the complainant was actually threatened, or that he even knew a threat had been made. *Id.* at 339-40. The jury was charged only on the offense of aggravated rape, and the aggravating element was a threat of serious bodily injury or death. *Id.* The Court of Criminal Appeals upheld the reversal of appellant's conviction, which had been based on a theory of party liability, because there was no evidence that he was aware that the

complainant had been threatened. *Id.* at 341-42. Thus, even if appellant participated in the robbery as the getaway driver, in order to uphold his conviction on the aggravated offense there must be evidence that appellant was aware that a firearm "would be, was being, or had been used or exhibited during the offense." *Wyatt v. State*, 367 S.W.3d 337 (Tex. App. – Houston [14th Dist.] 2012, no pet).

Here, there is no evidence that Sears was in the room when Broussard was threatened or that he knew a robbery had taken place or that guns had been used during the course of the robbery. There is no evidence that Sears knew any details of the robbery. There is only evidence that Sears may have been driving the red Toyota tundra that picked up three men who were alleged suspects in the robbery, but whom where never located or identified. Thus, there is no evidence to support a reasonable inference that Sears, even if he participated in the robbery as the getaway driver, was aware that a firearm would be, was being, or had been used or exhibited during the offense.

The State additionally argues that the eye witness may not have been able to see the long gun carried by one of the intruders from a distance, but it would have been visible to Sears. This argument is contrary to the evidence presented. Eye witness Portner testified that the red Toyota Tundra backed up towards him, was pretty close to him, he was slowing down to pull up to the light, and he was close enough to get the license plate number. (4RR, 12-13). He further testified that if the men had been carrying a gun he believed he would have seen it. (4RR, 12-16) Given that the

Toyota Tundra backed up towards him, got pretty close to him, and he was close enough to get the license plate number, it is reasonable to infer, just as he testified, that if one of the men had been carrying a long gun, he would have seen it. (4RR, 12-16).

The State also cites other "incriminating evidence" to support its argument that Sears would have known there was a weapon used during the commission of the offense. The State argues that Sears was 'the director of the offense," "would have known each person's role in the offense," and would have known that his co-conspirators planned to carry guns. However, the State points to no evidence or facts that would support any of these arguments, therefore, these conclusions are based on mere speculation and factually unsupported inferences or presumptions.

II. The Court of Appeals ruling should be upheld.

The Ninth Court of Appeals held that even if the jury believed that Sears participated in the robbery as the getaway driver for the three men who committed the robbery inside Brown's home, the record contains no evidence that Sears was aware that any firearm or other deadly weapon would be, was being, or had been used or exhibited during the offense. *Sears,* 2017 WL 444366 at * 9. The Court based this ruling on the following:

> The record contains no evidence that the three masked men exhibited or otherwise made Sears aware of their firearms at any time before they entered Brown's house. The record also contains no evidence that Sears became aware that firearms were being used or exhibited by the three men inside the house wile the robbery was in progress. The undisputed evidence presented at trial shows that while the masked men were committing the robbery inside Brown's home, Sears was in a red Toyota Tundra in front of or in the vicinity of Brown's house. There is no evidence that Sears entered Brown's house at any time while the robbery was being committed. *Id.*

In addition, the Court noted that there was no evidence that Sears could see into the home through the windows or otherwise to see what was happening inside. *Id.* Furthermore, the record contains no evidence to show that after the robbery, Sears became aware that the masked men had used or exhibited firearms during the commission of the offense. *Id.* at *10. The Court also stated that even if the jury reasonably believed that the three men the witness saw getting into the truck were the same men who robbed Brown and that Sears was the one driving the red truck the three men jumped into, the witness's testimony does not establish that any of the three men were displaying firearms or showed Sears firearms or made Sears aware that firearms had been used or exhibited during the commission of the offense. *Id.* Moreover, the Court considered the testimony that when Sears was arrested two days after the robbery driving the same red truck, there was no evidence that any firearms were located inside the truck. *Id.*

The Court correctly held that based upon the above evidence, or lack thereof, "although it would intuitively seem likely that Sears knew or saw the three men's guns before or after the robbery, without at least circumstantial evidence to support it such

a conclusion cannot properly be based on speculation or assumption." *Id;* citing *Wyatt*, 367 S.W.3d at 343 (quoting *Kanneh*, 2001 WL 931629 at *3). Thus, the Ninth Court's ruling should be upheld.

CONCLUSION

There was insufficient evidence to support Sears's conviction for the charged offense of aggravated robbery. There is insufficient evidence that Sears was responsible for the aggravating element of the offense because there is no evidence that Sears was aware of the use of a firearm during the commission of the offense. There is also no testimony or evidence to suggest that the three unidentified men who entered the red Toyota Tundra were in possession of a firearm at the time they entered the truck. These men were never identified or linked to the aggravated robbery. The only testimony regarding the aggravating element of the offense came from witness Broussard who testified that the men who entered her home robbed her and held her at gunpoint. Again, those men and those firearms were never located or identified.

While juries are permitted to draw multiple reasonable inferences as long as each reasonable inference is supported by the evidence presented at trial, juries are not permitted to come to conclusions based on mere speculation or factually unsupported inferences or presumptions. Here, there was no direct or circumstantial evidence presented at trial that would support a reasonable inference that Sears knew that a firearm would be, was being, or had been used or exhibited during the commission of

the offense and any inferences otherwise call for speculation and are factually unsupported. Thus, the evidence was insufficient that Sears was criminally responsible for the aggravating element of the offense. For all of these reasons, the opinion of the Ninth Court of Appeals should be affirmed.

PRAYER

The Ninth Court of Appeals opinion and judgment should be affirmed.

Respectfully Submitted,

/s/ Lindsey Scott

Lindsey M. Scott
State Bar No. 24055462
THE LAW OFFICE OF LINDSEY SCOTT
2809 Hwy 69 N.
Nederland, Texas 77627
Tel: (409) 727-1036
Fax: (409) 727-1239
lindsey@lindseyscottlaw.net

COUNSEL FOR RESPONDENT
ARMAUD SEARS

CERTIFICATE OF SERVICE

I hereby certify that a copy of Sears's Brief was sent to all counsel of record on November 15, 2017, via E-file service.

/s/ Lindsey Scott

Attorney at Law

CERTIFICATION OF COMPLIANCE WITH LENGTH

I, Lindsey Scott, hereby certify that this document was generated by a computer using Microsoft Word which indicates that the word count of this document is 9433 words, and is in compliance with Texas Rule of Appellate Procedure 9.4.(i).

/s/ Lindsey Scott

Attorney at Law